

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE**

IN THE MATTER OF THE DELAWARE)	
PUBLIC SERVICE COMMISSION'S)	
JURISDICTION OVER ELECTRIC VEHICLE)	PSC DOCKET NO. 19-0377
CHARGING STATIONS AND SERVICE)	
PROVIDERS (Filed June 11, 2019))	

COMMENTS OF THE DELAWARE DIVISION OF THE PUBLIC ADVOCATE

Pursuant to the procedural schedule approved in this docket, the Delaware Division of the Public Advocate ("DPA") hereby submits the following comments on the Hearing Examiner's questions.

I. Are private entities and/or public agencies that are not otherwise regulated by the Commission, but own and/or operate electric vehicle charging stations in Delaware for use by the public, "public utilities"?

26 *Del. C.* § 102(2) defines a "public utility" as: "... every individual, partnership, association, *corporation*, joint stock company, *agency or department of the State* or any association of individuals engaged in the prosecution in common of a productive enterprise (commonly called a "cooperative"), their lessees, trustees or receivers appointed by any court whatsoever, that now operates or hereafter *may operate for public use within this State...any ... electric (excluding electric suppliers as defined in § 1001 of this title)* ... service, system, plant or equipment." (emphasis added)

This definition of "public utility" was written well before the notion of electric cars and electric vehicle charging stations and services was more commonplace. The definition itself is ambiguous, and that ambiguity is the cause of this docket. Based on the definition, it can be argued that both private entities and public agencies that provide electric vehicle charging stations are indeed public utilities. However, it can also be argued that these stations are not "public utilities" as understood by the Commission. Instead, electric vehicle charging stations act as resellers of electricity. They neither produce electricity (supplier), transmit nor distribute electricity to end-use customers; indeed, the owner/operator of the charging stations is the end-use customer because of its customer relationship with the electric distribution company.

II. To the extent the Commission concludes the above-referenced entities and/or agencies are “public utilities” under 26 Del. C. § 102(2), should the Commission exercise its authority under 26 Del. C. § 201(d) to forbear from, in whole or in part, its supervision and regulation of some or all of electric vehicle charging products and/or services offered by these parties? If so, please identify the specific statutory and/or regulatory provisions the Commission should forbear on.

If the Commission concludes that electric vehicle charging stations are not public utilities, the Commission can explain why they are not, and close the docket. Alternatively, if the Commission does conclude that electric vehicle charging stations are “public utilities” pursuant to Section 102(2), then the DPA believes the Commission should forbear from supervising and regulating electric vehicle charging products and services.¹

26 Del. C. § 201(d)(1) allows the Commission to forbear from regulation “where the Commission determines that a competitive market exists for such products and services and where the Commission finds that such deregulation will be in the public interest.”

It is clear not only from the private companies that have intervened in this docket, but also the voluminous private investment in charging station companies around the country, that a competitive market exists in this area. ChargePoint, Tesla, Blink, Mercedes, General Motors, Volkswagen, and Shell (just to name a few) have all invested heavily in electric vehicle charging stations in the United States. Furthermore, the State, through the Department of Natural Resources and Environmental Control, provides financial incentives for installation of workplace charging stations, residential/home charging stations, and commercial charging stations.²

Each of these private companies takes the risk of building electric vehicle charging infrastructure upon themselves. They research and develop new technologies, such as inductive charging already in effect with Mercedes; they bear all of the risk; and they reap all of the profits (if there are any). On October 22, 2018, Delaware had 43 charging stations and 122 charging outlets throughout the state.³ As of September 24, 2019, Delaware has 51 charging stations and 169 charging outlets. Thus, in a little less than a year, Delaware has seen an increase in charging stations of more than 18 percent and an increase in charging outlets of more than 38 percent.⁴ It is clear that the competitive marketplace is thriving.

¹ Because of the potential impact on the distribution company, the utility may be informed when these stations are installed within their service territory to ensure adequate hosting capacity along with safe and reliable service. Additionally, depending upon how the electric vehicle driver is charged for the service, in the case of per kWh sales, the metering equipment may be subject to the oversight of the Division of Weights and Measures.

²<https://dnrec.alpha.delaware.gov/climate-coastal-energy/clean-transportation/ev-charging-equipment-rebates/>

³ AFDC research from October 22, 2018.

⁴https://afdc.energy.gov/fuels/electricity_locations.html#/analyze?region=US-DE&country=US&fuel=ELEC

In order to encourage expansion of these risk-based entities, it is important to provide certainty regarding Commission regulation. The DPA believes deregulating this industry will provide that certainty and is in the public interest. As noted in Staff's memorandum, in doing so Delaware would join 24 states that have exempted electric vehicle supply equipment from the definition of public utility.⁵

III. Should the Commission deem it in the public interest to forbear with respect to the above-referenced entities and/or agencies, is the Commission otherwise required to reach specific findings on the criteria enumerated in 26 Del. C. § 201 (d)(5), as incorporated in PSC Order No. 9418, and, if so, whether such findings are warranted with respect to the above-referenced parties?

The DPA does not believe that the Commission is required to reach specific findings on the criteria enumerated in any section other than 26 Del. C. § 201(d)(1). The Section 201(d)(5) criteria apply only if an entity other than the Commission requests the Commission to forbear from regulation. When the proposed order opening this docket was before the Commission on June 18, 2019, there was significant discussion on the need for the Commission to make its determination on its own motion. Chairman Winslow stated, "[T]his Commission will make its own motion with respect to the decision."⁶ Order No. 9418, approved by the Commission on June 18, 2019, reflects that the Commission opened this docket on its own motion rather than at the request of a private entity.

IV. Are private entities and/or public agencies, that are not otherwise regulated by the Commission, but own and/or operate electric vehicle charging stations in Delaware for use by the public, "electric suppliers" under 26 Del. C. § 1001(14) and § 1012?

To the DPA's knowledge, none of the private entities or public agencies have received certification by the Commission. Nor, to the DPA's knowledge, has the Commission advised these entities that they require a certificate to operate. This suggests that the Commission does not believe that these entities are electric suppliers in the sense of 26 Del. C. § 1001(14). The DPA would agree with that interpretation. However, these entities *do* sell electricity to retail customers utilizing the transmission and distribution facilities of a nonaffiliated electric utility (i.e. Delmarva Power, Municipal utilities, and the Delaware Electric Cooperative), and therefore fall within the strict definition of "electric supplier." Should the Commission make a determination that these entities are electric suppliers, it could open a docket to examine the certification and consumer protections needed to operate in Delaware. The Commission has no regulatory oversight over the prices charged, or services offered, by electric suppliers.

These entities' business model also presents another problem if they are Delmarva Power customers. Delmarva Power's tariff says, "The Customer shall not directly or indirectly sell, sublet, assign or otherwise dispose of the electric energy provided by the Company under combined Electric Supply & Delivery Service or provided by the Electric Supplier, or any part

⁵ EV Staff Memo Final, p. 7. 24 states have exempted electric vehicle supply equipment from the definition of public utility, three states exempting electric vehicle supply equipment in certain jurisdictions within those states, seven states are considering whether to exempt electric vehicle supply equipment from being "public utilities."

⁶ Transcript of June 18, 2019 Meeting, Docket No. 19-0377, at p. 7.

thereof, except as authorized by Chapter 51, Title 25 of the Delaware Code.”⁷ A Customer is “[a]ny adult person, partnership, association, corporation, or other entity: (i) in whose name an account is listed, (ii) who occupies or is the ratepayer for the premises, building, structure, etc., and (iii) who is primarily responsible for payment of bills. A Customer includes anyone taking Delivery Service or combined Electric Supply & Delivery Service from the Company under one service classification for one account, or premises. Multiple premises under the same name are considered multiple Customers.”⁸

Tariffs have the same legal effect as statutes. Because of this, the DPA believes that the private entities and state agencies that are Delmarva Power customers are violating Delmarva Power’s tariff. It appears that the tariff provision prohibiting the resale of electricity was approved prior to electric vehicles becoming a reality. The DPA suggests that the Commission open a docket on its own motion to amend the tariff to exempt electric vehicle charging stations.

V. To the extent the Commission concludes the above-referenced entities and/or agencies are “electric suppliers” under 26 *Del. C.* § 1001(14) and § 1012, should the Commission consider amendments to Title 26, Administrative Code, § 3001 Rules for Certification and Regulation of Electric Suppliers, that are more specific to those providing such electric vehicle charging services to the public? If so, please provide specific suggestions and/or a corresponding draft regulation.

The DPA does not believe that the private entities or public agencies providing electric vehicle charging are considered to be, nor should they be classified, as electric suppliers. However, as noted above, the statutory language places them squarely within the definition of “electric supplier,” and they are reselling electricity, which is forbidden in Delmarva Power’s service territory (and may be forbidden in non-regulated electric utilities’ service territories).

⁷ Delmarva Power & Light Company Second Revised Leaf No. 25, Section XI, A.

⁸ Delmarva Power & Light Company Fourth Revised Leaf No. 4, Definition of Terms.